Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

NO.
82-250

IN THE
Supreme Court of the United States
October Term, 1982

DR. WILLIAM TRULY, *Petitioner*

v.

Madison General Hospital
Sidney L. Whittington, Jacob M. Ritchey
Hite Wolcott, Donald Hawkins, L. C. Harris,
Strickland Sligh, Dr. T. O. Bailey,
Dr. G. A. Carmichael, Dr. Joe W. Terry,
Dr. C. H. Heywood, Dr. A. P. Durfey, Jr.,
Dr. Mitchell B. Wells, Dr. Allen G. Roark,
Dr. William B. Featherston, and
Dr. Robert Surratt
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY F. STATER, III
Montgomery, Smith-Vaniz & Stater
360 North Liberty Street
P. O. Box 284
Canton, Mississippi 39046
Telephone: 601-859-3616
Attorney for Respondents

Of Counsel:
MONTGOMERY, SMITH-VANIZ & STATER
Date: September 2, 1982

QUESTIONS PRESENTED

The Respondents would deny that the "Questions Presented" by the Petitioner to this Court in this case are proper questions to be presented to this Court as both of the "Questions Presented" seek to re-litigate facts already litigated and reviewed by the two Federal Courts which have previously considered this matter. Respondents submit that there are no questions of law, arising out of this case, requiring the review of this Court.

PARTIES TO THIS PROCEEDING IN THE COURT OF APPEALS

Plaintiff-Petitioner

Dr. William Truly

Defendants-Respondents

Madison General Hospital
Sidney L. Whittington
Jacob M. Ritchey
Hite Wolcott
Donald Hawkins
L. C. Harris
Strickland Sligh
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Dr. Allen G. Roark
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Dr. Robert Surratt
Dr. E. G. Spivey, Jr.

TABLE OF CONTENTS

Questions Presented..... i

Parties to the Proceeding in Court of Appeals.... ii

Prior Opinions..... 2

Jurisdiction..... 2

Statutes Involved..... 2

Statement..... 3

Reasons for Denying the Writ..... 4

Conclusion..... 9

Table of Authorities

Cases

Bowen v. Watkins, 669 F.2D 979, 984 (5th Cir. 1982)..... 8
Dixon v. Alabama State Board of Education, 294 F.2d, 150 (5th Cir. 1961)..... 6, 7
Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970) 6, 7
Hayman v. Galveston, 273 U.S. 414 (1927)..... 9
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d, 471 (1977).... 7
Truly v. Madison General Hospital, 673 F.2d, 763 (5th Cir. 1982)..... 2, 5

Statutes

28 U.S.C., Section 1254 (1)..... 2
42 U.S.C., Section 1983..... 3

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Respondents pray that a Writ of Certiorari be denied in this cause.

PRIOR OPINIONS

The Respondent states unto this Court that the opinion of the United States Court of Appeals for the Fifth Circuit in this case may be found as reported in *Truly v. Madison General Hospital,* 673 F.2d., 763 (5th Cir., 1982); and would further state that the unreported "Report and Recommendation of the United States Magistrate" and "Final Judgment" of the United States District Court for the Southern District of Mississippi are accurately reproduced in Apendices "A" and "B" of the Petition filed by Petitioner with this Court.

JURISDICTION

The Respondent agrees that the jurisdiction of this Court can be invoked in this Court through 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The Respondents agree that the Federal Statutes and Amendments to the Constitution of the United States as cited by the Petitioner have been previously raised in this case. The Respondents deny that the Statutes of the State of Mississippi cited by the Petitioner have any application whatsoever to the determination of this case.

STATEMENT OF THE CASE

This case was brought by the Petitioner, Dr. William Truly, a black physician, asserting that the Respondent, Madison General Hospital, a small public hospital, violated the Civil Rights guaranteed to the Petitioner by 42 U.S.C. §1983 and other enactments, when Respondent denied medical staff privileges to the Petitioner.

The Petitioner filed suit for injunctive relief from the United States District Court for the Southern District of Mississippi on the basis that his denial of staff privileges was based on his race or on the exercise by him of various Constitutional Rights and that he was not accorded procedural due process at the administrative level. The case was tried before a Magistrate and resulted in a Report and Recommendation adverse to the Petitioner. The Report and Recommendation of the Magistrate was adopted by the District Court which entered Judgment against the Petitioner.

An appeal of the Judgment of the District Court was taken to the Court of Appeals for the Fifth Circuit. In this appeal, the Petitioner abandoned his race claim and made the same arguments that are being presented to this Court for review: 1) That the Petitioner was not afforded adequate procedural due process at the administrative level; and 2) That the denial

of staff privileges to the Petitioner was based on an exercise of rights protected by the First Amendment.

The Fifth Circuit Court of Appeals reviewed the record in the case and the arguments of the Petitioner and found that there had been numerous findings of fact adverse to the Petitioner in the Trial Court and further found that the findings of fact were supported by the evidence in the case and were not clearly erroneous as alleged by the Petitioner.

The Court of Appeals then found that the District Court had properly applied the law to the facts established and found that the Petitioner had been accorded procedural due process at the administrative level and further found that, according to the findings of fact, the exercise of First Amendment Rights by the Petitioner was not a substantial or motivating factor in the denial of medical staff privileges to the Petitioner. The Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court and it is for that Judgment that the Petitioner is seeking a Writ of Certiorari to issue from this Court.

REASONS FOR DENYING THE WRIT

There are no propositions of law set forth in the Petition, by Petitioner, to this Court which have not been fully and

completely addressed and decided, in accordance with Constitutional principles and case law precedent, by the lower Courts.

1) The Petitioner complains that the rulings by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit will act to narrow the scope of procedural due process to which an individual is entitled in an administrative proceedings. The opinions of both Courts clearly show that the procedural due process argument was advanced at both the trial and appellate levels without success.

The issue of procedural due process is an issue of fact. The facts of this case, as found at trial by the Magistrate and reviewed on appeal by the Court of Appeals, established to the satisfaction of those Courts that procedural due process requirements had been met by the Respondents. The Court of Appeals, in their opinion, even stated that the notice given to the Petitioner by the Respondent was sufficient to comply with the system of "notice pleading" which is used in the Federal Court System and has been approved by this Court. *Truly v. Madison General Hospital,* 673 F.2d 763 at 766 (5th Cir., 1982).

The Petitioner mistakenly cites *Ferguson v. Thomas*, 430 F.2d, 852 (5th Cir., 1970), as a conflicting opinion to the one delivered by the Court of Appeals in the case at bar. The Petitioner states that the decision of the Court of Appeals in the case at bar narrows the minimum procedural due process requirement as required by the *Ferguson* case. A reading of the *Ferguson* case reveals the misapplication of this position. The Court of Appeals in the *Ferguson* case stated:

> "The rudiments of due process fair play in school administrative proceedings have been well outlined in this circuit with regard to the rights of college students who were subjected to the disciplinary suspensions. They are entitled to a statement of the charges against them, the names of witnesses, the nature of the testimony of those witnesses and the opportunity of presenting a defense. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir., 1961). These same minimum standards are applicable to teachers who have an expectancy of reemployment. However, the standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Ferguson v. Thomas*, 430 F.2d. 852 at 856.

The Respondent would submit to this Court that nothing in the Court of Appeals opinion in the case at bar changes or conflicts with the opinion in the *Ferguson* case at all. If anything, the opinion of the Court of Appeals in the case at bar might further define the general principles stated in the *Ferguson* case, but the opinion changes no substantive or procedural law.

2) The next contention of the petition is that the finding of fact of the Trial Court – that the exercise by the Petitioner of his First Amendment Rights was not a substantial or motivating factor in the denial of medical staff privileges to the Petitioner – was clearly erroneous and contrary to law and against the overwhelming weight of the evidence. The Petitioner, however, fails to inform this Court that the Court of Appeals was presented with this identical argument and disposed of it in accordance with the previous rulings of this Court.

The Court of Appeals stated in their opinion in the case at bar:

> "One does not always insure his own retention in employment by wrapping oneself in the first amendment and launching attacks on one's employer from within its folds. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). At some point, while the employer has no right to control the employee's speech, he does have the right to conclude that the employee's exercise of his constitutional privileges has clearly overbalanced his usefulness and destroyed his value and so to discharge him. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). We think the same principles generally apply to the situation of one, like Dr. Truly, seeking to obtain a position or privilege. It follows that where, as here, both constitutionally protected and other conduct is in question, the three-step process of *Mt. Healthy* is applicable. First the complainant bears the burden of showing the relevant conduct is constitutionally protected; second, that it was a substantial or motivating factor in the unfavorable action taken with reference to him. These burdens carried, the employer or person similarly situated – in this case, the hospital – may, third, seek to prove that it would have done the same regardless of the protected conduct.

> Here Dr. Truly failed at the second hurdle when the court found that something else, and not his exercise of constitutional rights, motivated the refusal to him of staff privileges.[7] Whether we might have so determined is of no moment; the record is such that the fact finder was empowered to do so. *Mt. Healthy,* supra at 287, 97 S.Ct. at 576.
>
> [7]Such a finding is one of fact, subject to review under the "clearly erroneous" standard. *Bowen v. Watkins,* 669 F.2d 979, 984 (5th Cir. 1982).

This clearly shows that the Court of Appeals carefully followed the guidelines sent to them by this Court in the *Mt. Healthy* case. The Court of Appeals carefully considered the protections afforded by the First Amendment to the Constitution recognizing that the record of the case provided a different picture than that presented by the Petitioner in his appeal to the Court of Appeals

The Petitioner now seeks review from this Court by also misrepresenting facts which have previously been considered and decided by two Courts. The First Amendment is under no danger of dilution by the Opinion rendered by the Court of Appeals and nothing in that Opinion conflicts with this Court's ruling in the *Mt. Healthy* case. The danger present is that this Court is being asked by the Petitioner to adjudicate facts that have previously been decided and reviewed by two Courts. The granting of certiorari by this Court in this case would open the flood gates of litigation and appeal to this Court even further; and would actually undermine the ac-

tivities of the Courts at the lower levels in the Federal Court System. Neither this Court nor the entire Federal Judiciary System should be subject to that subterfuge.

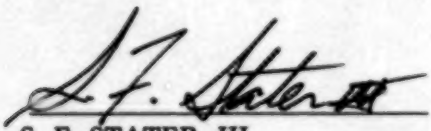
Respondent would finally submit to this Court that Petitioner is incorrect in his Petition in referring to medical staff privileges at a public hospital as public employment. This Court has found long ago that a physician does not have a Constitutional Right to practice his profession in a public hospital. *Hayman v. Galveston,* 273 U.S. 414 (1927).

CONCLUSION

The considerations given the claims of the Petitioner, by the Respondents, at the administrative level; by the U. S. District Court for the Southern District of Mississippi, at the trial level; and by the Court of Appeals for the Fifth Circuit, at the appellate level; are evidence of the fact that the Petitioner was granted every Constitutional and procedural safeguard to which even public employees are entitled in employment disputes. No legal precedents are in conflict with the actions of the Respondents, the Trial Court or the Court of Appeals and no Federal question is raised which has not been previously settled by this Court. Therefore, in accordance with Rule 17 of this Court, the Respondent respect-

fully submits that the Writ of Certiorari petitioned for in this case should be denied.

Respectfully submitted,



S. F. STATER, III
Of Montgomery, Smith-Vaniz and Stater
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, S. F. Stater, III, attorney of Record for the Respondents in the above entitled action, hereby certify that I have this day, postage prepaid, by United States Mail, mailed a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, upon the Honorable Edward Blackmon, Jr., Blackmon & Smith, P. O. Drawer 568, Canton, Mississippi 39046.

THIS 8th day of September, 1982.

S. F. STATER, III